IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 8, 2006

TERRANCE DAVIS v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2003-C-2000, 2003-C-2001 J. Randall Wyatt, Jr., Judge

No. M2005-01902-CCA-R3-PC Filed November 13, 2006

The petitioner, Terrance Davis, pled guilty to two counts of selling more than .5 grams of cocaine in a school zone in exchange for concurrent Range I sentences of twenty-two years served at 100%. The petitioner now appeals the post-conviction court's denial of his request for post-conviction relief and contends that (1) he received the ineffective assistance of counsel and (2) his guilty pleas were unknowing and involuntary. Upon review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, Jr. and NORMA McGEE OGLE, JJ., joined.

Michael A. Colavecchio, Nashville, Tennessee, for the appellant, Terrance Davis.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Kathy Morante, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

In indictment 2003-C-2000, the petitioner was charged with possession with intent to deliver 26 grams of cocaine in a school zone and possession of a firearm by a convicted drug felon. In indictment 2003-C-2001, the petitioner was charged with delivery of more than .5 grams of cocaine in a school zone and delivery of more than .5 grams of cocaine. On December 4, 2003, the petitioner pled guilty to two counts of selling more than .5 grams of cocaine in a school zone and was sentenced to concurrent sentences of twenty-two years. The remaining counts were dismissed. Thereafter, the petitioner filed a timely petition for post-conviction relief, and later an amended

petition was filed. The post-conviction court conducted an evidentiary hearing on June 29, 2005.

Post-Conviction Evidentiary Hearing

At the hearing, the petitioner testified that at the time of his plea, he was unaware that there were two indictments against him and that he was pleading guilty in two separate cases. The petitioner stated that he was also not aware there was a gun charge against him. When asked whether he remembered the prosecutor announcing the terms of the plea agreement and saying that two charges would run consecutively, the petitioner said that he did not remember the prosecutor saying that and he only received a copy of one indictment. The petitioner stated that he only knew the amount of time he would serve; he did not think there were two cases against him.

The petitioner said that he retained counsel to represent him, and counsel did not show up at the preliminary hearing. As a result, the petitioner was forced to waive his hearing and have the case bound over to the Grand Jury. The petitioner later elaborated that counsel actually did show up at the preliminary hearing but was late and he had already waived the hearing. The petitioner stated that he met with counsel only one time between his arrest and entry of his guilty pleas. The petitioner also stated that counsel did not visit him in jail, show him a copy of the indictment, provide him with information received in discovery, or file any motions on his behalf. According to the petitioner, the only thing counsel showed him was a plea petition.

The petitioner stated that counsel did not investigate his case and did not explain the ramifications of his offenses occurring in a school zone. The petitioner stated that he did not realize an offense would be designated a school zone case if it took place within 1000 feet of an educational facility until after he had already pled guilty. The petitioner said that no one ever measured the distances where the offenses occurred to determine if they were within 1000 feet of a school.

The petitioner testified that he was never told about the state's proof against him; he just trusted what counsel told him to do. The petitioner admitted that he would not be surprised if the state had evidence that he made drug deals using his cellular phone. According to the petitioner, counsel told him if he pled guilty and agreed to a twenty-two year sentence, he would be eligible for parole after five years. The petitioner also stated that counsel told him he could possibly get boot camp for 120 days and then be released. The petitioner admitted that when he entered his pleas the trial judge told him his sentence was twenty-two years at 100%, but he did not say anything because he believed he would only serve the five years that counsel told him. The petitioner said that, in hindsight, his pleas were not voluntary because he thought he was getting a different deal than he received. The petitioner further said that he did not like his deal even though he received concurrent sentences and avoided federal prosecution. The petitioner stated that he graduated from high school and admitted he had two prior felonies for the sale of .5 grams of cocaine for which he was on probation.

The petitioner's trial counsel testified that he had practiced law since 1981and ninety-nine percent of his practice was devoted to criminal law. Counsel estimated that he had worked on more

than 500 drug cases in his career. Counsel admitted that he only met with the petitioner once with regard to the present offenses, but he talked to him on the phone ten or fifteen times and met with him a great deal regarding previous drug cases in Dickson County. Counsel estimated that he spent a total of eight hours on the pleadings, talking to the officers, and reading the discovery.

Counsel said that after he talked to the officers and found out what their testimony would be, he felt the petitioner should waive his preliminary hearing. Counsel also said that the petitioner knew what the officers would testify to and went along with waiving the preliminary hearing. Counsel stated that the petitioner knew the allegations against him, and counsel gave the petitioner's wife a package of discovery materials. Counsel testified that he filed a motion for discovery, but he did not file any other motions. Counsel recalled that he explained the difference between a school zone and non-school zone case to the petitioner during the preliminary hearing stage.

Counsel testified that the petitioner faced serious time because he was a Range II offender and there was no way he could contest the school zone charge. Counsel explained that the petitioner told him where the sales happened and counsel's investigator did a visual of the scene. Counsel said that "[t]here was no question about it being near the school." Counsel testified that the defense strategy was to minimize the petitioner's exposure because he potentially faced federal charges. Counsel said he sought to get the petitioner the least amount of time possible, as well as have the gun charge dismissed. Counsel stated that the petitioner potentially faced a sentence of fifty years if he went to trial. Counsel testified that he told the petitioner he would have to serve 100% of his sentence. Counsel recalled that the petitioner asked him about boot camp, and he told the petitioner he would have to ask the people in the Department of Correction. Counsel said that part of the petitioner's deal was that he was allowed to plead as a Range I offender and there would be no federal prosecution. Counsel stated that he felt the petitioner received a good deal, and the petitioner was a "smart man" who did not want to risk a lot of time.

STANDARD OF REVIEW

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

ANALYSIS

I. Ineffective Assistance of Counsel

The petitioner first argues that he received the ineffective assistance of counsel. Specifically, he argues that counsel did not explore possible defenses, did not verify that the offenses occurred in a school zone, and gave him incorrect sentencing information.

In order to prevail on a claim of ineffective assistance of counsel, the petitioner bears the burden of proving (1) that counsel's performance was deficient, and (2) the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings were fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Id.* at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. When a petitioner claims ineffective assistance of counsel in relation to a guilty plea, the petitioner must prove that counsel performed deficiently, and, but for counsel's errors, the petitioner would not have pled guilty but, instead, would have insisted upon going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Should the petitioner fail to establish either element of ineffective assistance of counsel, the petitioner is not entitled to relief. Our supreme court described the standard of review for ineffective assistance of counsel as follows:

> Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component.

Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 697).

In finding that the petitioner received the effective assistance of counsel, the post-conviction court accredited counsel's testimony that there were no defenses of any substance readily available to the petitioner; therefore, the defense strategy was to avoid a trial and plead guilty to the lowest possible sentence. The court found that counsel adequately investigated and discovered that the drug offenses occurred within 1,000 feet of a school, with one of the offenses occurring on the school's basketball court. The court also found that counsel explained to the petitioner that the sentence he would receive as a result of the guilty pleas was a sentence of twenty-two years that must be served at 100%, and the court also explained the same to the petitioner. The court noted that the petitioner never brought to its attention any discrepancy between his belief that he would serve five years of the sentence and the court's instruction that he would serve his entire sentence. The court concluded that counsel represented the petitioner in a competent and thorough manner.

The record does not preponderate against the post-conviction court's findings. At the evidentiary hearing, counsel testified that the defense strategy was to minimize the petitioner's exposure because he potentially faced federal charges. Counsel said he sought to get the least

amount of time possible and have the gun charge dismissed. Counsel stated that he had no way of contesting the charge that the petitioner sold drugs within 1,000 feet of a school because the petitioner told him where the sales occurred, counsel's investigator did a visual of the scene and "[t]here was no question about it being near the school." Counsel said he told the petitioner he would have to serve 100% of his sentence and did not tell the petitioner he would only serve five years. Counsel also said he did not tell the petitioner that he may only have to serve 120 days in boot camp. We note, issues in this case regarding the credibility of witnesses and the weight and value to be accorded their testimony were resolved by the post-conviction court. *See Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997). Accordingly, we conclude the evidence supports the post-conviction court's determination that counsel's performance was not deficient. Therefore, the petitioner is not entitled to relief on his claim of ineffective assistance of counsel.

II. Guilty Pleas

The petitioner also argues that his guilty pleas were not knowingly, voluntarily, and intelligently entered. When analyzing a guilty plea, we look to the federal standard announced in *Boykin v. Alabama*, 395 U.S. 238 (1969), and the state standard set out in *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977). *State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999). In *Boykin*, the United States Supreme Court held that there must be an affirmative showing by the trial court that a guilty plea was voluntarily and knowingly given before it can be accepted. *Boykin*, 395 U.S. at 242. Similarly, our Tennessee Supreme Court in *Mackey* required an affirmative showing of a voluntary and knowing guilty plea; namely, that the defendant has been made aware of the significant consequences of such a plea. *Mackey*, 553 S.W.2d at 340; *see Pettus*, 986 S.W.2d at 542.

A plea is not "voluntary" if it results from ignorance, misunderstanding, coercion, inducements or threats. *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993). The trial court must determine if the guilty plea is "knowing" by questioning the defendant to make sure he fully understands the plea and its consequences. *Pettus*, 986 S.W.2d at 542; *Blankenship*, 858 S.W.2d at 904. In determining whether a plea is voluntary and intelligent, the court must consider

> the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship, 858 S.W.2d at 904 (citations omitted). A petitioner's testimony at a plea hearing that his or her plea is voluntary is a "formidable barrier in any subsequent collateral proceeding[]" because "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

In its order, the post-conviction court found that the petitioner was informed by counsel and the court that he was receiving a sentence of twenty-two years that must be served at 100%. The court also found that the petitioner did not alert the court to any discrepancy between his belief that he would serve five years of his sentence and the court's instruction that he would serve 100%. The court further found that the evidence did not support the petitioner's contention that he was told he may only have to serve 120 days in boot camp. The court noted that the petitioner had above average intellect, was familiar with criminal proceedings, was represented by a competent attorney, was aware of the charges against him and the potential penalties, and avoided federal prosecution and received concurrent sentences as a result of his pleas.

We note that the petitioner failed to include the transcript from the plea acceptance hearing in the record on appeal. It is the duty of the appealing party to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal. *See* Tenn. R. App. P. 24(b); *State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993).

As such, the evidence in the record does not preponderate against the post-conviction court's finding that the petitioner's pleas were knowingly, voluntarily, and intelligently entered. The available record reflects that the petitioner was familiar with criminal proceedings and was represented by competent counsel. The record also reflects that the petitioner potentially faced a Range II sentence of fifty years given the amount of drugs he sold near a school. The record further reflects that counsel advised the petitioner he would have to serve 100% of his sentence and did not tell the petitioner he would only have to serve 120 days or five years. Thus, we conclude the petitioner's pleas were knowingly, voluntarily, and intelligently entered, and the petitioner is not entitled to relief on this claim.

CONCLUSION

Based on the aforementioned reasoning and authorities, we affirm the post-conviction court's denial of the petitioner's request for post-conviction relief.

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J.C. McLIN, JUDGE